

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 2004-246

October 22, 2004

U.S. CELLULAR  
Request for Designation as Eligible  
Telecommunications Carrier

ORDER DENYING REQUEST  
FOR PROTECTIVE ORDER

---

**I. SUMMARY**

In this Order, the Hearing Examiner denies the request of U.S. Cellular for a protective order for two “radio frequency propagation maps” that show U.S. Cellular’s existing coverage in Maine and its expected coverage<sup>1</sup> if the Commission decides that U.S. Cellular is an eligible telecommunications carrier (ETC).

**II. BACKGROUND**

On April 8, 2004, U.S. Cellular filed an application with the Commission requesting that the Commission designate it as an “eligible telecommunications carrier” (ETC). On August 26, 2004, it filed a letter stating that it would soon be filing prefiled testimony and the two radio frequency propagation maps described above and requesting that the Hearing Examiner issue a protective order for the maps. The letter contained no support for the request other than a statement that the Hearing Examiner in the RCC case, Docket No. 2002-344, had issued such an order. Attached to the letter was a draft protective order. The draft stated only that U.S. Cellular had claimed that the maps were “commercially sensitive and that disclosure of such information would be injurious to U.S. Cellular’s business interests,” but failed to explain why the information was commercially sensitive and should be subject to protection.

In an e-mail sent to counsel on September 8<sup>2</sup>, the Examiner requested U.S. Cellular to provide argument supporting the conclusory statements contained in the proposed draft motion. U.S. Cellular filed a request for a protective order and supporting memorandum on September 14, 2004.

---

<sup>1</sup> U.S. Cellular’s initial letter requesting protection and its later letter providing argument provide no greater detail about the nature of these maps than that they show existing and proposed coverage. A description of the type of radio frequency maps that certain wireless carriers will make public in November is quoted at note 9. A hyperlink to an example of a radio frequency propagation map published by the National Weather Service is provided in note 12.

<sup>2</sup> The e-mail is now part of the record in the case.

### III. U.S. CELLULAR'S ARGUMENT

In its memorandum, U.S. Cellular argues:

Mobile service providers do not make RF propagation maps public, and all such maps are treated as confidential and proprietary in the industry. The Company has never made such maps public and has successfully obtained protection for such maps in each of the jurisdictions where it has sought ETC status, as RCC did in its ETC case before this Commission.

The compelled release of an RF propagation map by Carrier A would permit Carrier B, a competitor, to identify those areas where Carrier A has no or limited coverage. Carrier B would be able to discourage customers from taking service from Carrier A by pointing to areas where Carrier A's service is limited. Moreover, Carrier B might make claims regarding its own coverage that Carrier A would find difficult to refute (since it would not have Carrier B's RF propagation map available). Thus, since Carrier B's RF propagation map is not in the public record, Carrier A would be at a distinct competitive disadvantage.

Obviously, this is not a hypothetical in this instance: the Commission extended protected status to RCC's maps in the RCC case. In any event, T-Mobile, Verizon Wireless, AT&T, Sprint and any other non-ETC wireless carrier operating in Maine would gain an unjustifiable advantage over U.S. Cellular were the Company compelled to spread its RF propagation maps on the public record. One result would be to needlessly discourage Maine wireless carriers from seeking ETC status, since doing so would place them at a competitive disadvantage with non-ETC wireless carriers.

In his email communication to the Company, the Examiner correctly notes that the extent of a carrier's coverage is extremely important to a customer considering taking service from a given carrier. While this is certainly true, it does not follow that a mobile carrier seeking ETC status should be required to place competitively sensitive proprietary information (that is universally treated as such in the cellular industry) on the public record.

U.S. Cellular then argues that it provides customers with adequate coverage information in the following ways:

U.S. Cellular addresses coverage questions from potential customers in two ways, neither of which require the publication of its confidential RF propagation maps. First, the Company's sales personnel (and its agents' sales personnel) are generally familiar with the Company coverage area and are normally able to answer specific coverage questions posed by potential customers.

Each customer has his or her own individual service and coverage requirements, however, and sales personnel are not always able to provide firm answers to customers' coverage inquiries. For this reason, and as a promotional

policy, U.S. Cellular offers a thirty-day risk-free trial period for all new customers. Under this policy, any new customer may return his or her phone and terminate his or her service contract at any time thirty days after entering into the contract for any reason... . This allows the customer the opportunity to determine the exact degree of coverage experienced in the areas where the customer regularly uses his or her mobile phone and then decide whether U.S. Cellular's service is satisfactory, or whether he or she should try a different carrier. ...

The Company's thirty-day risk-free trial period policy is a customer-friendly approach to determining coverage adequacy. By contrast, trying to discern from an RF propagation map whether a potential customer will get adequate coverage in the specific locations of interest to that customer would not be advisable. These maps, while useful for many purposes, cannot always predict the exact signal strength in the specific spots or routes of most interest to customers. For example, a customer wishing to use his or her mobile phone for primary service will want excellent coverage in his or her home. An RF propagation [map] may show good coverage in the general area of the customer's home, but fail to indicate that the in-building coverage will not be satisfactory. Only by using the phone in that location over a period of time will the customer be able to confirm that he or she has the desired signal strength.

#### IV. DISCUSSION AND DECISION

U.S. Cellular has applied to the Commission to designate it as an ETC, i.e., as a telecommunications carrier eligible to receive federal universal service funding that it claims will be spent to increase its coverage area. Under 47 U.S.C. § 214(e)(2), state utility commissions decide whether to make such designations. Necessarily, a carrier seeking ETC status in Maine must file its application with the Maine Public Utilities Commission (MPUC). U.S. Cellular claims that it will use the federal universal service funding that it expects to receive, if it is granted ETC status, to expand its coverage "in certain rural areas in Maine." The radio frequency propagation maps that show existing and proposed coverage are therefore highly relevant to this proceeding.

##### A. Applicable Statutory Law

The MPUC, like all agencies in Maine government, is subject to the provisions of the Freedom of Access law, 1 M.R.S.A. §§ 401-412. Section 408 states "Except as otherwise provided by statute," all public records shall be available to the public for copying or inspection. Section 402(3) defines a "public record" as follows:

**3. Public records.** The term "public records" means any written, printed or graphic matter ... that is in the possession or custody of an agency or public official of this State ...and has been received or prepared for use in connection

with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except: ... .

The definition lists 13 exceptions. U.S. Cellular's claim of confidentiality invokes the first and second exceptions:

- A. Records that have been designated confidential by statute;<sup>3</sup>
- B. Records that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding;

The exception stated in paragraph A incorporates 35-A M.R.S.A. § 1311-A, applicable to this Commission. That section states in part:

Records placed under a protective order by the commission pursuant to the Maine Rules of Civil Procedure, Rule 26(c) in accordance with this section, are within the scope of a privilege against discovery within the meaning of Title 1, section 402, subsection 3, paragraph B and are not public records while under the protective order.

**1. Issuance of protective orders.** The following provisions govern the commission's issuance of protective orders.

- A. The commission may issue protective orders to protect the interests of parties in confidential or proprietary information, trade secrets or similar matters as provided by the Maine Rules of Civil Procedure, Rule 26(c). ...
- B. In granting protective orders, the commission shall balance the need to keep the information confidential with the policies of conducting its proceedings in an open and fair manner where all parties have the right and opportunity to participate effectively as provided under the Maine Administrative Procedure Act, the Maine Rules of Civil Procedure, the Maine Rules of Evidence and the Maine freedom of access laws.
- C. The party requesting a protective order bears the burden of demonstrating the need for protection. ...

The exception stated in paragraph B of Title 1, section M.R.S.A. § 402(3) invokes the protective order provisions of the Maine Rule of Civil Procedure (M.R.Civ.P.) 26(c) and M.R.Evid. 507. M.R.Civ.P 26(c) governs protective orders for trade secrets and other

---

<sup>3</sup> Because this provision incorporates a large number of statutory exceptions, the total number of exceptions to "public records" greatly exceeds 13.

claims of confidentiality at the discovery stage of proceedings. M.R.Evid. 507 governs claims of trade secret privilege at trial. These rules govern proceedings before the Commission because of their incorporation through 35-A M.R.S.A. § 1311.

Section 1311-A cross-refers to M.R.Civ.P 26(c) and therefore is not substantively different from the rule, except that the “balancing” directive in subsection 1(B) arguably may modify the “liberal exercise” directive in Rule 26(c).<sup>4</sup> Neither the statute nor the rule provides any significant guidance about what is or is not “confidential.” The question still remains whether U.S. Cellular’s radio propagation maps are “confidential or proprietary information.”

B. Consideration of U.S. Cellular’s Claim

U.S. Cellular asserts industry practice as a major argument. Even if it has been the practice of the wireless phone industry not to disclose coverage information, that practice is not dispositive of whether the information should be found to be confidential for the purpose of this case.

For most confidentiality claims before the Commission, the primary concern that the Examiner or Commission must consider is the effect of release in a market context:

---

<sup>4</sup> Rule 26(c) states: “The power of the court under this rule shall be exercised with liberality toward the accomplishment of its purpose to protect parties and witnesses.” U.S. Cellular’s radio frequency propagation maps will undoubtedly be entered into evidence, and M.R.Evid. § 507, which governs trade secret privilege at the trial or hearing stage, contains no stated rule of construction. The *CMP/HQ Trade Secret Order* recognized, however, that the two rules should be as “congruent.” *CMP/HQ Trade Secret Order* at 2, citing *Weinstein’s Evidence, United States Rules* ¶ 508 and n. 2. In their role as “exceptions” to the Freedom of Access law, however, the “liberal exercise” directive runs up against a requirement of the Freedom of Access law that “[t]his subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.” 1 M.R.S.A. § 401. The “declaration of intent” (also in Section 401) states:

The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly.

As noted above, 35-A M.R.S.A. § 1305-A contains a third possible rule of construction – that the Commission should “balance” the need to keep certain information confidential with the interests of parties and the public “as provided in” the civil rules, the Rules of Evidence and the Freedom of Access law. The Examiner finds that it is not necessary to resolve the potential conflict in rules of construction in this case because the claim that the information is or should be confidential is not sufficiently strong.

is (or should be) the information a trade secret or otherwise confidential in the marketplace in which the claimant operates? In this case, it is necessary to consider those claims and arguments. It is also necessary in this case to consider the role of the information in this proceeding, as discussed below.

With regard to the market, information about existing coverage and rates is the most important information that can provide guidance to potential customers about which cellular carrier to choose. U.S. Cellular's argument emphasizes the harm that its wireless competitors can cause to it from the release of the maps. Its argument, however, fails to distinguish between the map that shows existing coverage and that which shows proposed coverage. Logically, however, U.S. Cellular's arguments can only apply to the existing-coverage maps. It makes no independent argument of competitive harm that might occur as a result of release of the proposed coverage map.

U.S. Cellular's argument also ignores the fact that the existing-coverage map can be a double-edged sword both for U.S. Cellular and its competitors. A competitor can point out weaknesses in U.S. Cellular's coverage as well as strengths in its own coverage. Similarly, U.S. Cellular can point out strengths in its coverage and weaknesses in a competitor's coverage. Despite U.S. Cellular's concerns (which in its view may outweigh potential benefits), coverage information has potential value to customers and is a potential marketing tool for U.S. Cellular.

An entity claiming that certain materials should be afforded protective status must establish is that public release will cause harm to the claimant. See *Central Maine Power Company, Petition for Certificate of Public Convenience and Necessity for Proposed Purchase of Generation Capacity and Energy from Hydro-Quebec*, Docket No. 87-268, Trade Secret Claims, Motion to Compel, Disclosure and Protection; Order No. 3 (March 22, 1988) at 4-5 (*CMP/HQ Trade Secret Order*). For the reasons described above, it is not entirely clear that release of U.S. Cellular's radio frequency propagation map for its existing coverage will cause it harm. As noted above, it makes no argument that release of the proposed coverage map will cause it any of the competitive harms that it claims.

A claimant must also establish that release will provide an *unfair* competitive advantage to a competitor. *Id.* at 5. It is difficult to argue in this case that any advantage that will accrue to U.S. Cellular's wireless competitors is "unfair." It is true that U.S. Cellular will not have access to the radio frequency propagation maps of some other wireless carriers<sup>5</sup> and that it will be at a disadvantage compared to those other carriers. However, unlike other wireless carriers (except one), U.S. Cellular has chosen to seek public funding for expansion by filing an application and radio frequency propagation maps with a public agency that is subject to the Maine Freedom of Information law. In other words, any disadvantage to U.S. Cellular is a result of its decision to make the filing and subject itself to the Maine Freedom of Access law. Were other wireless

---

<sup>5</sup> As discussed below, pursuant to unfair trade practice claims, three major wireless carriers have agreed to make coverage maps available in 32 states.

carriers to make similar applications, they would be subject to the same law and, presumably, to similar rulings.<sup>6</sup> It is not appropriate to grant confidentiality status to materials that should not otherwise be confidential under the law solely because competitors have not made filings with public agencies that are subject to the Freedom of Access Law.

A competitive market generally is more efficient and provides greater consumer benefits when information about pricing and product quality is widely available. The industry's practice (or possibly tacit agreement) to suppress product quality information (coverage) has been called into question by 32 state attorneys general, including the Attorney General for Maine, who alleged (among other claims) that failure to provide radio frequency propagation maps violate consumer protection and trade practice statutes in the 32 states.<sup>7</sup> Three major cellular providers (Verizon Wireless, Sprint and Cingular Wireless) recently entered agreements (alternatively characterized as "Assurance[s] of Voluntary Compliance" and "Assurance[s] of Discontinuance") with the attorneys general. Under the Assurances, the cellular companies have agreed, beginning on November 18, 2004,<sup>8</sup> to provide, both in printed form and on websites, "maps depicting approximate Wireless Service coverage applicable to the Wireless rate plan(s) being sold."<sup>9</sup>

The market for wireless services is not the only market in which U.S. Cellular competes or hopes to compete. U.S. Cellular's Application places great emphasis on

---

<sup>6</sup> The Examiner is aware that protection for similar maps was granted to RCC Minnesota in the case addressing its application for ETC status, Docket No. 2002-344. To the Examiner's knowledge, the issues raised by the Examiner in this case were not raised in the RCC case

<sup>7</sup> The Maine Unfair Trade Practices Act is located at 5 M.R.S.A. § 205-A *et seq.*

<sup>8</sup> See, e.g., *In the Matter of Cingular Wireless LLC*, ¶ 51, filed in Maine Superior Court, Kennebec County, Docket No. CV-2004-169.

<sup>9</sup> The Assurances provide considerable detail about the requirements that the maps must meet. The maps:

will be generated using predictive modeling and mapping techniques commonly used by radio frequency engineers in the wireless service industry to depict approximate outdoor coverage, based on then-appropriate signal strength for the applicable wireless technology and signal strength confidence levels under normal operating conditions on Carrier's network, factoring in topographical conditions, and subject to variables that impact radio service generally. All such maps will include a clear and conspicuous disclosure of material limitations in Wireless Service coverage depiction and Wireless Service availability.

[Wireless carriers must provide] separate ... maps depicting approximate Wireless Service coverage on a nationwide and regionwide basis... .  
Assurances, § 28.

the competition it hopes to provide to wireline incumbent local exchange carriers (ILECs) and the benefits of that competition for consumers. The Application states the purpose of the TelAct is to promote competition, and that FCC and state Commission decisions dealing with ETC status for wireless carriers emphasize that purpose. U.S. Cellular claims that the proposed public funding will enable it expand its service and compete with ILECs in the areas in which it expands service.<sup>10</sup> U.S. Cellular claims that its competition will “spur a competitive response from affected ILECs,” which could include “improved service quality and competitive service; new investments in telecommunications plan; more rapid deployment of high-speed data (DSL) service, ....” Yet while U.S. Cellular seeks to suppress information showing its coverage area, the potential competitors described in the application (the ILECs) place poles and wires on the landscape, allowing the extent of their coverage to be highly visible.<sup>11</sup>

The purpose of allowing confidential treatment of certain kinds of information is not solely to avoid harm to individual competitors, but ultimately to promote and enhance competitive markets. The type of information that traditionally receives “trade secret” protection include inventions or processes that might allow the competitor in a competitive market to operate more efficiently or gain an edge on competitors, and that the owner has made great effort or expense to develop or acquire. The release of that kind of information might very well deter future inventiveness (and investments). The extent to which U.S. Cellular provides, or does not provide, service is surely not information in that category. Radio frequency propagation maps convey nothing more than information that is publicly available (at least by trial and error), albeit in substantially less convenient form.<sup>12</sup> Release of the existing-coverage map (which may

---

<sup>10</sup> The Application refers to “competition” (or variants such as “competitive”) or “choice” at least 31 times.

<sup>11</sup> The Application places great emphasis on competition with the ILECs but it makes no mention of competition with other wireless carriers. Conversely, U.S. Cellular’s memorandum in support of its request for a protective order places great emphasis on the harm that could come from its wireless competitors if U.S. Cellular, but not other wireless carriers, is required to make its coverage maps public. It makes no claim, however, that would-be competitive ILECs can cause competitive harm to it with the existing-coverage map.

<sup>12</sup> Much of U.S. Cellular’s argument is devoted to the claim that customers are likely to be confused or misled by the maps. U.S. Cellular claims, for example, that radio reception within a building may be much poorer than outside. As discussed above, the Assurances of Discontinuances entered into by Verizon Wireless, Sprint and Cingular specifically require the maps those companies to provide to show outdoor coverage. Plainly, maps may include warnings and other notes explaining of qualifying what is depicted on the maps. See, e.g., the National Weather Service “Coverage Map Notes” at <http://www.nws.noaa.gov/nwr/usframes.html> stating the color coding and limitations of the radio frequency propagation maps which show coverage by each NOAA Weather Radio transmitter. An example of an actual map for a Maine transmitter is at <http://www.nws.noaa.gov/nwr/me/dresden.gif>.



benefit potential consumers, including some who may be convinced to subscribe to U.S. Cellular) is not likely to deter U.S. Cellular from improving its product or from making the means by which it provides that product more efficient. In this case, release of existing coverage information most likely would strengthen, not weaken, the competitive market for telephone (both wireless and wireline) services.

As discussed above, U.S. Cellular makes no argument that releasing the proposed-coverage map will cause it competitive harm; has nothing to do with existing competitive markets. It may be somewhat speculative; it may be a “business plan,” but it is not clear why it should be “confidential,” given its lack of marketplace impact and the role of U.S. Cellular’s proposed coverage in this proceeding. Central to its claim that the Commission should grant it ETC status is that it will use that public money to expand its coverage to areas in which it does not presently provide adequate service. See U.S. Cellular Application, ¶¶ 31-34, 37-39. Both its present and its proposed coverage are highly relevant to whether U.S. Cellular should receive public funding.<sup>13</sup> It is the difference between the two maps that shows what will be accomplished with the public funding if ETC status is granted. U.S. Cellular’s Application also points out that if ETC status is granted and universal service funding is provided, it must commit to “advertising” the services () that are supported by that funding. Application, ¶¶ 5, 22, citing 47 U.S.C. § 214(e)(1)(B). That advertising presumably will include information about coverage. Under the balancing test required by 35-A M.R.S.A. § 1311-A, the need for present and proposed coverage information to be public, in a proceeding that must assess whether the proposed change in coverage justifies public funding, outweighs any marketplace claim of U.S. Cellular that the maps should be found to be confidential business information.

Accordingly,

The request by U.S. Cellular for a protective order restricting access the radio frequency propagation maps described above is DENIED.

Dated at Augusta, Maine, this 22nd day of October, 2004.

BY ORDER OF THE HEARING EXAMINER

---

Peter Ballou

---

<sup>13</sup> In determining whether confidential treatment should be granted to various information requested in discovery, the *CMP/HQ Trade Secret Order* discussed above balanced the claimed need for confidentiality against the extent to which the information was highly or marginally relevant to the case.